IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1148 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PRIYAMVADAN MAGANLAL PATEL

Versus

HARIBHAI VISWANATH SHUKLA

Appearance:

1. Civil Revision Application No. 1148 of 1998

MR ARUN H MEHTA for Petitioner No. 1

MR HRIDAY BUCH for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 29/09/2004

ORAL JUDGEMENT

This revision application is preferred by the original plaintiff of Regular Civil Suit No.59 of 1986. The said suit was filed by the plaintiff in the Court of Civil Judge (J.D.) at Sihor. The plaintiff has filed the aforesaid suit for getting decree for possession. The plaintiff is the owner of the property situated in Sihor town known as Patel Building. The defendant was let out two rooms of the said building at monthly rent of

Rs.35/-- for residential purpose.

2) The said suit was filed on various grounds, such as arrears of rent, change of user, permanent alteration in the suit property as well as acquisition of alternative accommodation. However, since the learned advocate for the applicant has restricted his arguments only in connection with acquisition of alternative accommodation under Section 13 (1) (l) of the Bombay Rent Act, the matter is required to be examined only from that angle.

3) The suit of the plaintiff was resisted by the defendant on various grounds. So far as ground about acquisition of alternative accommodation is concerned, initially, the same was not taken in the plaint and after amending the plaint, ground of acquisition of alternative accommodation was pleaded by making an averment in the plaint that the defendant has purchased alternative accommodation on 20th June, 1988. The description of the said premises is given as City Survey No.2641 and 2166, which according to the plaintiff is adjoining to the rented premises. However, the defendant has denied any acquisition of alternative accommodation, as according to the defendant, said new premises is constructed by his two sons from their separate earnings.

4) So far as acquisition of alternative accommodation is concerned, the trial Court, after considering the evidence on record came to the conclusion that as per the sale deed at Exh.58, it can be seen that the said new house is purchased by the sons of the defendant, namely, Milankumar and Atul by paying Rs.1,25,000/-, from one Parshottam alias Babulal Parmanand Patel on 20th June, 1988. The said house is adjoining to the suit premises. The trial Court has found in para 77 of the judgement that four houses were constructed in Patel Building by the grandfather of the plaintiff and one house came to the share of the plaintiff's uncle one Mr.Parmanand Patel. The said house is purchased by the sons of the defendant. It is found by the trial Court that ground floor of the new premises was occupied by telephone exchange as a tenant, which was subsequently vacated by the telephone exchange on 30-11-1993 and the sons of the defendant have got the possession of the ground floor. It is also found that there are 11 to 12 rooms in the newly constructed premises. On appreciation of evidence and after considering the income of the defendant as well as income of his two sons, the trial Court came to the conclusion

that even though the house in question is purchased in the name of Milankumar and Atul, the defendant has invested most of the amount for the purchase of new premises. It is also observed by the trial Court that the new house was also managed by the defendant and the defendant has full control over the said house therefore, the defendant can go and occupy the said house. Accordingly, the trial Court came to the conclusion that the defendant has acquired alternative accommodation as contemplated by Section 13 (1) (l) of the Bombay Rent Act. The trial Court has dealt with the said question in great detail in para 77 of the order. The trial Court has further held that as alternative accommodation was not available with the defendant when the suit was filed, decree for possession cannot be passed on that ground, as it cannot be said that on the date of filing of the suit, alternative accommodation was acquired by the defendant. Accordingly, the suit was dismissed by the trial Court.

5) Thereafter, the original plaintiff has carried the matter further by filing appeal being Civil Appeal No.102/1994. The appellate Court has found that since the plaintiff was permitted to amend the plaint by which the plaintiff was permitted to add the ground of alternative accommodation, such ground can be taken into consideration while passing the decree. The appellate Court has found in para 11 of its judgement that subsequent event can be taken into consideration, which has occurred during the pendency of the suit. However, on appreciation of evidence, the appellate Court came to the conclusion that it cannot be said that the new house is acquired by the defendant himself and it can be said that the aforesaid house is purchased by his two sons from their own earnings as well as by raising loans and, therefore, it cannot be said that the new house is acquired by the defendant himself. The appellate Court has found that simply because the tenant was managing the affairs of the new premises, it cannot be presumed that the tenant himself has acquired the said premises. The said observation is finding place in paragraph 12 of the judgement. Accordingly, the appellate Court has confirmed the decree of the trial Court by which the trial Court has dismissed the suit. The appellate Court has also confirmed the decree of the trial Court on other grounds.

6) It is required to be noted that so far as purchase of the house in Patel Building is concerned, the trial Court has found that new house can be said to have been acquired by the defendant himself, however, the trial Court has negatived the claim of the plaintiff on

the ground that the aforesaid new house was purchased subsequent to the filing of the suit and therefore, decree cannot be passed in favour of the plaintiff. The appellate Court has reversed the said finding, though the appellate Court has specifically found that even if the house in question is purchased subsequently, the same can be taken into consideration. On merits, the appellate Court has found that it cannot be said that the house in question is purchased by the defendant from his own income. Therefore, it cannot be said that there is concurrent finding of both the Courts below.

7) As pointed out earlier, Mr.A.H.Mehta, learned advocate for the applicant has pressed into service only one point regarding acquisition of alternative accommodation as contemplated by Section 13 (1) (l) of the Bombay Rent Act. Therefore, the point which requires consideration is whether it can be said that the house in question is purchased by the sons of the defendant or it is acquired by the defendant himself and whether the suit is required to be decreed on the ground of acquisition of alternative accommodation as contemplated by Section 13 (1) (l) of the Bombay Rent Act.

8) I have heard learned advocates for both the sides at great length. I have also gone through oral as well as documentary evidence on record. Copy of evidence and paper book is made available for perusal of this Court by learned advocates of both the sides. Mr.Buch has also given copy of his brief arguments.

9) Mr.A.H.Mehta, learned advocate for the applicant has vehemently submitted that this is a case in which the tenant has misused the provisions of the Bombay Rent Act, It is submitted by Mr.Mehta that the appellate Court has committed factual error by observing in paragraph 11 of its judgement that both the sons of the defendant are doing business. He submitted that the appellate Court has also erred in observing that initially, one flat was purchased in the name of wife of elder son and after selling the said flat, a plot was purchased at Sihor and after selling the said plot new premises is purchased by the sons of the defendant, after taking loan from the relatives of the defendant. It is submitted by Mr.Mehta that the plot at Sihor is sold after purchasing the new premises, as against that the appellate Judge has held that the new premises is purchased from the income of sell of plot at Sihor and according to him, the said observation is factually incorrect. So far as this aspect is concerned, the learned advocate for the other

side has also conceded that the said observation in the judgement is not correct, as the plot at Sihor was sold subsequently after purchasing the new premises.

10) Mr.Mehta has submitted that so far as plot at Sihor is concerned, the same is purchased by the defendant as "karta" of H.U.F., and, there is nothing on record to show that partition has taken place at any point of time.

11) Mr.Mehta has submitted that as per the evidence on record, it is clear that Atul and Milankumar were serving as clerks and they have hardly any income for purchasing the premises in question.

12) Mr.Mehta has also submitted that the amount received from the sell of the plot at Sihor is shared between the members of the family and accordingly, defendant and his three sons have got 1/4th share each, therefore, it is not possible to believe the say of the defendant that loan amount taken for the purchase of said plot was returned back to the relatives of the defendant from the sell of the plot at Sihor. Mr.Mehta has also submitted that no relatives of the defendant are examined, who have given loan for the purchase of the house in question. Mr.Mehta further submitted that considering the evidence on record it cannot be said that there was sufficient income by which the sons of the defendant could have purchased the house in question. Mr.Mehta has taken me through the entire evidence on record to substantiate his say that the appellate Judge has misread the evidence and has not considered relevant part of the evidence for coming to the conclusion that newly acquired premises is purchased by the sons of the defendant from their own savings.

13) It is submitted by Mr.Mehta that the defendant was serving on a very high post and even during the service he had gone to foreign. According to him, the defendant himself has purchased new house in the name of his two sons or in any case, he has played a major financial role for the purchase of the said house or in any case, it can be said that the house is purchased from the income of H.U.F. Therefore, according to Mr.Mehta, the defendant has also got substantial right so far as newly purchased house is concerned. It is submitted by Mr.Mehta that it is an admitted fact that till the new house is purchased, the defendant and all other family members were residing together in joint family, including the sons of the defendant, Atul and Milankumar. In order to substantiate his say, Mr.Mehta has relied upon oral

and documentary evidence on record. Mr.Mehta has also submitted that the defendant has not produced on record, any bank account or passbook of his sons to substantiate his say that his sons were having sufficient income nor any income tax returns of his sons were produced. He has submitted that none of the relatives have been examined to find out whether the loan amount is repaid or not. It is also further submitted by Mr.Mehta that even for evicting earlier tenant, i.e., telephone department, the defendant has played an active role. Mr.Mehta has also submitted that since the entire family was residing as one unit before the new premises was purchased, if any members of the family has acquired new premises, provisions of Section 13 (1) (l) are attracted.

14) It is also submitted by Mr.Mehta that as per the evidence on record, prior to the purchase of the new premises, a flat was purchased in the city of Ahmedabad in the name of the wife of one of the sons of the defendant and at the time of purchase of said flat the defendant had contributed an amount of Rs.72,000/-, and if the new premises is acquired from the amount received from the sell of said flat of Ahmedabad then also there is nothing on record to show that the said amount of Rs.72,000/- given by the defendant to his son has been repaid by his son to the defendant.

15) Mr.Mehta has also submitted that so far as flat at Ahmedabad is concerned, as per Exh.59, which is a sale deed of the said flat, an amount of Rs.12,000/- was spend for the purchase of stamp and other expenses like registration, brokerage, drafting charges etc. Considering the fact that the flat at Ahmedabad is in the name of Maltiben, it can be said that she was merely a benami and entire price can be presumed to have been paid by the defendant and the amount received from the sale of said flat is utilised for the purchase of new house in Patel Building. Mr.Mehta has further submitted that considering the expenditure of stamp duty etc., in connection with the sell of the flat at Ahmedabad, it is not possible to believe that the new acquired premises is purchased from the profit of sell of the aforesaid flat, as the sons of the defendant were required to spend for stamp duty and other expenditure.

16) Accordingly, Mr.Mehta has submitted that the appellate Judge has completely misread the evidence and has not considered the evidence in its proper perspective and that is why the mistake is committed by the appellate Judge which is required to be corrected in this revision application preferred under Section 29 (2) of the Bombay

Rent Act.

17) Mr.Mehta has further submitted that new premises consists of 12 rooms, as against that only one son is residing with his family in the said premises.

18) Mr.Mehta has also submitted that the defendant has not led any evidence to prove that in which manner two sons of the defendant have paid the amount for the purchase of the house in question. It is also submitted that no relatives of the defendant are examined, who, according to the defendant, have given loan to his two sons for the purchase of new house. He further submitted that there is nothing on record to show that the loan is repaid by the sons of the defendant to his relatives. It is no doubt true that the burden of proving the fact that the defendant has acquired alternative house is on the plaintiff, but in any case the party in possession of the best evidence is required to produce such evidence on record and in a given case, the Court may draw an adverse inference. Except the bare say of the defendant that some relatives have given loan, there is nothing on record to show that actually any such loan was given by the relatives of the defendant, as no relatives have been examined and there is nothing to show that such loan is ever repaid. Therefore, Mr.Mehta has submitted that the appellate Judge has not examined evidence in its proper perspective and the appellate Court has not even considered the aspect whether sons of the defendant have repaid the amount of loan to the defendant or to defendant's relatives.

19) Mr.Mehta has also further submitted that the appellate Judge has committed obvious error in observing in paragraphs 11 and 12 of the order that both the sons of the defendant are carrying on business at different place, while it is an admitted fact that the sons of the defendant are working as clerks and drawing very meagre salary.

20) Mr.Mehta has submitted that the trial Court has also committed an error by observing that decree cannot be passed on the ground of acquisition of alternative accommodation as the house in question is purchased during the pendency of the suit and the said house was not available on the date of filing of the suit. Mr.Mehta has relied upon various judgements on the point regarding drawing adverse inference against the party who fails to produce the evidence in its possession as well as on the point of jurisdiction of this Court under Section 29 (2) of the Rent Act, as well as on the point

of acquisition of alternative accommodation, which are as under :

AIR 1917 P.C. 6
AIR 1961 SC 1316
AIR 1968 SC 1413
AIR 2003 SC 4355
AIR 1969 SC 1330
AIR 1998 SC 3325
1988 (2) GLR 1442
2000 (3) GLR 2110
1974 (XI) G.L.T.31

21) However, so far as the aforesaid aspect of acquisition of alternative accommodation subsequent to the filing of the suit is concerned, since the appellate Court, itself has reversed the said finding of the trial Court, it is not necessary to discuss this aspect in detail as even the learned advocate for the other side has also not argued that this subsequent event could not have been taken into consideration. Even otherwise, if it is established that during the pendency of the suit, the tenant has acquired alternative accommodation, then naturally the Court can pass a decree for eviction on the aforesaid ground.

22) Mr.Hriday Buch, learned advocate for the respondent has submitted that the appellate Court has given finding of fact on appreciation of evidence by holding that the newly constructed premises is purchased by the sons of the defendant, viz., Atul and Milankumar. Mr.Buch has submitted that even if the defendant has helped his sons in purchasing the new house, it cannot be said that the house in question is purchased by the defendant himself. According to Mr.Buch, there is nothing wrong if the father gives any financial help to his sons to settle them in life. It is submitted by Mr.Buch that simply because the father was managing the affairs of the house in question, it cannot be said that the house in question is purchased by the defendant himself. It is also submitted by Mr.Buch that, as the two sons were not going well with other family members, ultimately, those sons have constructed their own house and they have shifted to that house and the rented premises is occupied by the defendant, who is staying there with his wife, another son and daughter-in-law.

At this stage, Mr.Mehta has submitted that there is nothing on record to show that any dispute had taken place between the defendant and his sons.

23) Mr.Buch has further has further submitted that since the wife and son of the defendant are examined, it cannot be said that the defendant has failed to discharge his burden of proof and therefore, no adverse inference can be drawn by the Court. Mr.Buch further submitted that the son of the defendant cannot be compelled to allow his father to stay and reside with him. It is submitted by Mr.Buch that there is no evidence to show that the house in question is purchased by the defendant himself and under these circumstances, this Court cannot interfere with the aforesaid finding of fact recorded by the appellate Judge, in a revision under Section 29 (2) of the Bombay Rent Act. It is submitted by Mr.Buch that it cannot be said that the appellate Court has committed any error of law by dismissing the appeal of the plaintiff and therefore, also this revision application is required to be dismissed. Mr.Buch has also submitted that finding of fact recorded by the appellate Court cannot be interfered with by this Court, as this Court cannot reappreciate the evidence on record.

24) Mr.Buch has relied upon various judgements on the point involved in this matter, citations of which are as under :

AIR 2000 SC 1386
2000 (3) GLH 76
29 (2) GLR 1442
AIR 1967 SC 256
AIR 1967 SC 450
AIR 1967 SC 1134
1988 (2) SCC 488
2001 (1) GCD 25
1998 (2) GLH 535
1997 (2) GLH 463

25) So far as finding of the appellate Court is concerned, as pointed out earlier, there is a factual error in the judgement of the appellate Court, wherein it is held that after the sell of the plot at Sihor, new premises is constructed by the sons of the defendant from the income received from the sell of the said plot.

26) Firstly, it is required to be noted that there is a factual mistake in the judgement of the appellate Court, wherein the appellate Court has observed that after the sell of the plot at Sihor, sons of the defendant have purchased the new house by utilizing the amount, which they have received from such sell. The appellate Court is the final Court so far as appreciation

of evidence is concerned, therefore, an important duty is given to the appellate Court to examine the evidence very minutely, therefore, the appellate Court is required to give finding of fact after considering entire evidence in its proper perspective. In the instant case, the reasoning given by the trial Court in paragraphs 77 and 84 of its judgement, has not been properly dealt with by the appellate Judge while reversing the finding of the trial Court on the point of acquisition of alternative premises. It is required to be noted that the tenant has not examined his relatives, who have given loan to his sons to substantiate his say that the loan was given by his relatives or even to prove that such loan was actually repaid by his sons to the relatives. In fact, there is no satisfactory evidence on record to show that the sons of the defendant were having sufficient income for the purpose of purchase of house in question.

27) In a given case, if it is proved that so called acquired premises is purchased from the income of H.U.F. or the tenant has contributed substantially for the purchase of new house, and the tenant has domain over the newly acquired premises, naturally, the Court can pass decree under Section 13 (1) (l) of the Bombay Rent Act. It is required to be noted that there is no evidence on record to show that the relationship of defendant and his sons was deteriorated at any point of time. As a matter of fact, from the evidence, it is clear that the relationship of the defendant and his sons is very cordial and they were staying together before the new premises is purchased. Even this part of the evidence is also not properly discussed by the appellate Judge in his judgement, on the contrary, some factual mistakes have been committed in the judgement.

28) I find considerable substance in the say of Mr.Mehta that even if it is presumed that there was a profit of Rs.35,000/- from the sell of the flat at Ahmedabad, then also it is not possible to believe that from this amount new premises is purchased, as the Court has not considered the expenditure of registration, documentation etc., which is required to be incurred at the time of sell of the flat at Ahmedabad. Even there is nothing on record to show that in which manner the relatives of the defendant have given loan to the sons of the defendant and in which manner said amount has been repaid. Even the son of the defendant has stated in his evidence that he is unable to give particulars about the draft of Rs.1,25,000/-, which was taken from the State Bank of Saurashtra, at the time of purchase of house at Sihor. All these aspects have been dealt with by the

trial Court in its judgement and even that part is not properly dealt with by the appellate Court, while reversing the finding of the trial Court.

29) In my view, the appellate Court has not considered the evidence properly and instead of considering the evidence in this revision application, it would be just and proper to send the matter back to the appellate Court for giving appropriate finding, after appreciating the evidence on record. Whether the defendant has domain over the house in question is the question, which is required to be considered by the appellate Court after appreciating evidence on record. The appellate Court after considering the evidence on record, may give specific finding whether it can be said that the new house is purchased from the income of H.U.F. or whether the defendant has played substantial financial role for the purchase of said house or whether the defendant has got control over the new house or whether it can be said that the acquisition of new house is on behalf of the joint family. It is also required to be considered whether the sons of the defendant had got any independent income for purchasing new house. It is also required to be considered whether the loan in question is repaid by the sons of the defendant. Since I am inclined to send the matter back, it is not necessary to deal with the judgements cited by both the sides as ultimately, it is for the appellate Court to give appropriate finding on the issue of acquisition of alternative accommodation.

30) The appellate Court may re-examine the question so far as it relates to acquisition of alternative accommodation as contemplated under Section 13 (1) (l) of the Bombay Rent Act and thereafter, the appellate Court may give specific finding as indicated above. The appellate Court shall consider the entire evidence afresh and so far as observation of this Court is concerned, the same is tentative in nature and the appellate Judge is free to take his own decision without being influenced by the reasoning given by this Court in the present judgement.

31) It is clarified that so far as finding of the appellate Court on other points is concerned, the same stands concluded and only the question of acquisition of alternative accommodation is required to be considered.

32) This Court could have examined all the questions raised in this matter, but since there is a factual mistake in the judgement of the appellate Court, it would

be just and proper to send the matter back to the appellate Court for giving its specific finding after considering the evidence on record. Accordingly, the appellate Court shall decide the matter afresh in light of above observations. Since the matter is very old, the appellate Court is directed to decide the matter within a period of two months from the date of receipt of the writ of this Court.

33) Accordingly, the matter is sent back by setting aside the impugned order of the appellate Court. Accordingly, this Revision Application is allowed to the aforesaid extent. Rule is made absolute accordingly with no order as to costs.

34) Writ to be sent to the trial Court forthwith.

(P.B.Majmudar,J.)

/malek